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No. 92-556

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

U.A. LOCAL 38 CONVALESCENT TRUST FUND,
ESTATE OF JOSEPH P. MAZZOLA and
ARISTOCRAT HOTELS, INC.,
Petitioners,

v.

CAROL BRADEN, JUANITA RAYMOS,
CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

JOSEPH L. ALIOTO
650 California Street
Suite 2500
San Francisco, CA 94108
Tel.: (415) 434-2100
Attorney for U.A. Local 38 Convalescent Trust Fund

LAWRENCE ALIOTO
465 California Street
Suite 736
San Francisco, CA 94104
Tel: (415) 399-0533
Counsel of Record and Attorney for All Petitioners

PETER P. MACHI
246 Van Ness Avenue
San Francisco, CA 94102
Tel.: (415) 621-1501
Attorney for Estate of Joseph P. Mazzola

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

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PETITIONERS' REPLY BRIEF

May it please the Court,

1. Pendent Jurisdiction

The docket entries in this case indicate that plaintiffs settled their claims with Local 18 on or before October 19, 1988 (Docket Entries, No. 96). That is the date the last federal claim was eliminated from this case. Thereafter, the only claims litigated in this case were claims among California citizens under the California Fair Employment and Housing Act.

Plaintiffs did not file their motion for order certifying a class until March 10, 1989 (Dkt. No. 116). Plaintiffs' summary judgment motions were not filed until October 16, 1989, about a year after plaintiffs had settled with Local 18. In other words, the District Court's retention of subject matter jurisdiction in this case cannot be justified by a substantial investment of the trial court's time in the case prior to dismissal of the federal claims.

All the federal claims were voluntarily dismissed. All are now res judicata.

Throughout the proceedings, even to the filing of pretrial statements, plaintiffs Braden et al. contended the trial court lacked subject matter jurisdiction. On subject matter jurisdiction in plaintiffs' Pretrial Statement it was said: "Plaintiffs have contested the jurisdiction of this Court from the time this case was first removed from the Superior Court of the County of Lake by predecessor defense counsel . . . Plaintiffs still dispute that this Court has jurisdiction of this case." Plaintiffs Pretrial Statement, May 4, 1990, pp. 2-3.

Any estoppel of these defendants to urge a remand to state court and any unfairness to the judgment winners disappear if on appeal in the case the Court finds reversible error requiring a complete new trial. Also, *United Mine Workers vs. Gibbs,* 383 U.S. 322, 86 S.Ct. 1130 (1966) and *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343 (1988) both suggest the District Court should on its own remand or dismiss actions which belong in state court.

Since at least *Textile Workers vs. Lincoln Mills,* 353 U.S. 448, 775 Ct. 912 (1957) this Court has attempted to harmonize state and federal judicial jurisdiction in cases involving labor relations and employment. *Lingle v. Norge* 486 U.S. 399, 108 S.Ct. 1877 (1988) is an attempt to leave to the state courts labor relations cases as to which there is no federal preemption policy or rule. The case at bar is such a case.

This Court should reverse plaintiffs' judgments and remand this case to state court.

2. Summary Judgment of Retaliation in Favor of Carole Braden and Wanda Brooks.

Carole Braden did not file a complaint with the California Department of Fair Employment and Housing in 1986. In the original November 17, 1987 complaint in this case it is alleged at page 15: "On or about June 17, 1986, plaintiffs Raymos, Brooks, and Chrapowicz filed timely charges of sex discrimination with the California DFEH and the Equal Employment Opportunity Commission regarding the acts and practices of defendants alleged herein. Due to the fact that her initial pre-complaint questionnaire was lost, plaintiff Braden filed her complaint on or about September 17, 1987." This allegation is consistent with the fact that neither the agency, nor the employer, nor Braden had a copy of any 1986 complaint by Braden.

After Konocti announced the 1986 Italian cuisine program, and informed Braden and the other plaintiffs they could not work full time in the dining room, Braden left Konocti on May 17, 1986 and worked for two years at a Lake County Restaurant called Oakes Corral.

Braden did not reapply for work at Konocti in 1987.

In their November 7, 1989 Opposition to Summary Judgment at page 6, these Petitioners admitted plaintiffs' statement that all plaintiffs except Braden reapplied for work at Konocti in 1987. At the hearing on the motion (November 17, 1987, p. 12), Petitioners advised the Court that Braden had not reapplied in 1987. Nevertheless, the trial court determined on summary judgment, and instructed the jury to find, that defendants had illegally retaliated against Carole Braden in 1987. Petitioners made several pre-verdict attempts to rectify this matter, all unsuccessful. Any directed verdicts or summary judgment on retaliation against Braden in 1987 should have been in favor of Petitioners, not Braden.

On the November, 1989 summary judgment motion, defendants' response noted the deposition testimony of Marjorie Wright, who was Braden's and Brook's supervisor, and who had testified that Braden and Brooks had worked full time in 1988 (Dkt No. 155, p.7). For this reason Braden and Brooks were not entitled to summary judgment on the multifarious issue of retaliation in 1988 and 1989.

3. 1986 Discrimination

On summary judgment on 1986 discrimination Judge Legge denied plaintiffs' motion. Citing *McDonnell Douglas* by name, the Court stated (no attempt is made to correct the reporter's errors):

> "The defendant has made a showing of disputed facts. Now, the argument becomes a question of whether the factual contentions are or are not credible, but that is not something that I can't resolve on summary judgment motion. The defendant has made a showing which if believed — if believed, could establish a defense to the four elements of the McDonald Douglas analysis.
>
> "There is a factual dispute really on the core issue, that is the key issue here of whether they were rejected from employment because of gender, or they were rejected for employment because of bona fide occupational qualifications. Now the argument is made that all this was professional but maybe it was, but I just cannot establish that on summary judgment." (Hearing of November 17, 1989, pp. 6-7).

Petitioners had opposed the motion on the basis of the Ted Hudson deposition. Hudson was a Konocti dining room waiter in 1985, 1986 and 1987. He testified that two years' prior experience in Italian cuisine tableside service was the objective requirement for serving the 1986 menu. Hudson's testimony, as well as Exhibit 15, which sets forth Konocti's reasons for not hiring any of the plaintiffs as full time dining room waitresses in 1986, were delivered to this Court in a 48 page Evidentiary Appendix on October 21, 1992.

Judge Legge properly noted that the California Courts have adopted the *McDonnell Douglas* rule, in cases under the California Fair Employment and Housing Act and other employment discrimination cases. See California cases cited in *Stephens v. Coldwell Banker*, 199 Cal.App.3d 1394, 1400 (1988).

Viewing the evidence in the light most favorable to Petitioners, there can be no doubt that there are in this case issues for the jury on two sub-parts of the plaintiffs' burden under *McDonnell Douglas*. They are: (1) whether plaintiffs were qualified to do the work in question and (2) whether plaintiffs were as qualified for that work as the persons who were hired to do it. The jury did not have to find for Petitioners on these issues, but it reasonably could have.

In 1986 after some of the Italians had left Konocti, management hired David Johnson as a waiter in the dining room. Johnson had once been a busboy for some of the plaintiffs. Johnson, already an aeronautical engineer by the time of trial, attempted to testify favorably to plaintiffs, saying that he obtained the 1986 dining room waitering job just by asking, without any special training. However, on cross-examination of Johnson, evidence was elicited that he had worked for two years as a waiter at an Italian

restaurant in Marin County, Marin Joe's. This appeared on Johnson's employment application to Konocti. He thus satisfied the objective requirement of prior experience in an Italian restaurant (Ex 15, p.6), which all the other 1986 waiters met.

Ronald Hudson, Ted's son, worked in the dining room in 1986 as a bus boy, not a waiter. He had bussed dishes for plaintiffs. At his father's request to the maitre'd, Ronald was permitted to work as a waiter for about a week, before quitting Konocti.

Alleged admissions of Konocti personnel, to the effect that women were to be excluded from the dining room in 1986, presented credibility issues which should be resolved in Petitioners' favor on directed verdict. *Anderson v. Liberty Lohby Inc.*, 477 U.S. 255, 106 S.Ct. 2505; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598.

Petitioners won the class action allegations of this case by showing that women were well represented in all departments of Konocti. This too is evidence in Petitioners' favor on the issue of 1986 dining room discrimination.

The jury found that Joseph Mazzola was guilty of discrimination in the matter of the 1986 dining room policy. The trial Court instructed the jury to find that the policy was illegal, and asked the jury to find whether Mazzola had participated in it. The Court instructed as follows (Proceedings of July 16, 1990, p. 13):

> "All right. Now, the first charge that the plaintiffs make here is one of sex discrimination. As you will see in the verdict form, I have found and you will find this in question No. 1, that as a matter of law, the Defendants Convalescent Trust Fund and Aristocrat Hotels did discriminate against the four named plaintiffs on the basis of their sex.
>
> "That question is eliminated from your consideration. The question you will have to decide with respect to gender discrimination is whether the defendant Joseph Mazzola also discriminated against the named plaintiffs in violation of California Law.
>
> "So, that is your one decision with respect to finding of liability on gender discrimination, and that is, whether Joseph Mazzola was responsible for it."

It is a bootstrap argument to say that the finding against Mazzola is a finding that the 1986 program is discriminatory. The Court having instructed the jury that the program was discriminatory, the finding against Mazzola can be nothing more than a finding that Mazzola supported the program, which Petitioners have never denied.

All Petitioners are entitled to a new trial on the central issue of 1986 sex discrimination.

4. Excessive Damages

Plaintiffs assert that the damages of lost wages awarded by the jury are supportable under either the 1986 discrimination finding or the 1987 retaliation finding. Respondents' Brief, fn. 7. That is not the case.

On Petitioners' new trial motion, plaintiffs, having interviewed the jury, told the Court:

> "When plaintiffs inquired, the jury informed them that they did not rely on either defendants' or plaintiffs' calculations, but chose to make their own. The calculations were made using the earnings of the highest paid dining room table server in 1986 and 1987 as a base entitlement salary for each of the four plaintiffs, and for 1988 and 1989 for plaintiffs Brooks and Braden. To this they added 15% of the KHI dining room's gross revenue in each year, distributed in various percentages to the various plaintiffs based on the jury's conclusions as to what percentage of total possible tips each plaintiff would have been able to earn had they been allowed to work without the discriminatory impact they suffered in each applicable year. The 15% of gross dining room revenue was added because it was the opinion of the jury that *all* food servers underreport their tips, but that this had no bearing on the right to be compensated for their loss. Thereafter, they deducted all monies actually earned by each plaintiff by way of mitigation." Dkt. No. 329, p.13.

Here we have alleged consecutive violations occurring not simultaneously but over consecutive time periods -- 1986, 1987, 1988, and 1989. Damages were calculated for each year and were then added together. If liability is absent in one or more years, damages must be reduced.

Also, Respondents state that hourly wage rates were lower in the coffee shop than in the dining room (Brief, p. 2). However, Juanita Raymos testified before the jury (June 7, 1990 p. 300):

"Q. Now, you testified that you worked under the Collective Bargaining Agreement between Konocti Harbor Inn and Local 18.

"A. Yes, I did.

"Q. In that, it sets forth what the hourly wages would be?

"A. Yes.

"Q. In 1985 and '86 was there any difference in the hourly pay between a dining room waitress and a coffee shop waitress?

"A. No. That's waitresses as far as your pay goes.

"Q. Is it the same whether you're working in the coffee shop or the dining room?

"A. I believe so." (June 7, 1990, pgs. 300-301).

In fact, it is the same. The Collective Bargaining Agreement is in evidence (Refs. Ex 28, p. 10). It shows the hourly wage rate for eight hours of straight time for waiters, waitresses, carhops and bus persons to be $33.78 in 1986. The Italian waiters of course received the same hourly wage as the plaintiffs.

It is pertinent to show some representative earnings in 1986, coffee shop versus dining room.

		Hours Worked
Ted Hudson	$8,698.86	889.5
Oscar Miglioli	8,202.52	862.5
Juanita Raymos	8,453.44	883.
Christine Chrapowicz	8,271.78	1,031.75
Wanda Brooks	7,435.66	805.5
Carole Braden	8,847.00	1,157
Corrado Di Pietro	5,716.91	549.5

Defs. Ex. 20. These figures include wages and reported tips.

Hudson, Miglioli and Di Pietro worked in the Konocti dining room. Raymos, Chrapowicz and Brooks worked in the Konocti coffee shop. Braden worked for a short time at Konocti Harbor Inn, and then for most of the season (ie. after May 17, 1986) at a Lake County restaurant called Oakes Corral.

5. Attorney Fees.

A. Discovery of Plaintiffs' Attorneys' Original Time Records.

Plaintiffs insist on referring to their hours summaries as "records" (Brief, p. 15). At the hearing on attorney fees, the trial court asked plaintiffs' counsel: "Well, those summaries are not contemporaneous records, are they?" Counsel, Mr. Pearl, responded: "No. Some are not contemporaneous, and I won't deny that". Hearing of December 14, 1990, p. 16. A copy of that hearing transcript was delivered to this Court on or about September 30, 1992.

No contemporaneous time records were produced. The original contemporaneous records were prepared before plaintiffs knew that hours devoted to the class action would not be compensable; the summaries were prepared after the class action judgment was entered against plaintiffs, indeed after plaintiffs had decided not to appeal the adverse judgment on the class action. The problem with the summaries is that the Court and opposing counsel are told only what plaintiffs' counsel, with full knowledge of what is compensable and what is not, are willing to tell. This is not an

acceptable way of arriving at a substantial judgment for attorney fees. Under the hearsay rule, the summaries are not even admissible, Federal Rules of Evidence 1006, although the original records may be under Federal Rules of Evidence 803(6).

5. Attorney Fees

B. Discovery of the Fee Agreement.

Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985) and *Sullivan v. Crown Paper Board Co.,* 719 F.2d 667 (3rd Cir. 1983) suggest there are at least three ways a trial court might deal with a contingency fee agreement on a fee-setting motion:

1. The Court might reduce the appropriate court-awarded fee, the lodestar, by the amount of the contingent fee;

2. The Court might award the full lodestar but require the plaintiffs' lawyer to waive the contingent fee up to the amount of the lodestar, requiring the client to pay the lawyer the amount by which the contingent fee exceeds the lodestar;

3. The Court might award the full lodestar to the plaintiff and make no ruling concerning the contingent fee. Our case falls into the third category. The cases cited in *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) indicate that the Circuits use all three methods. There ought to be a uniform rule on the subject.

The second method appears to be the rule most widely used. What is pernicious about that rule is that it makes a new contract for the plaintiff and his lawyer. Such action unnecessarily involves the Court in the relations of the lawyer and his client and creates adversarial tension between lawyer and client where before there was none. See *Vanegas v. Mitchell* 495 U.S. 82 (1990).

The problem with the third category, in which the Court ignores the fee agreement, sets the lodestar fee and awards it, is that the attorney may wind up with the contingent fee and the court-awarded fee. Defining the lodestar as a reasonable fee, the attorney receives more than a reasonable fee under this method, and somebody's resources, either the client's or the defendant's, have been wasted.

This Court's opinion in *Vanegas vs. Mitchell*, 495 U.S. 82 (1990) seems to favor the first alternative, whereby the lodestar is reduced by the amount of the contingent fee. In *Vanegas*, this Court enforced the fee agreement.

The fee agreement should affect the lodestar. It is also clear that the fee agreement should affect any possible enhancement of the lodestar. This Court has stated that the fee agreement may have a bearing on the question of enhancement of the lodestar, since the lawyer may have offset the risk of loss by negotiating a contingency which, if it materializes, would produce compensa-

tion greater than the prospective lodestar amount. *Pennsylvania v. Delaware Valley Citizens Council*, 483 U.S. 711, 107 S.Ct. 3078, 3099 (1987). See also Justice Blackmun's statement in *Dague,* supra, 112 S.Ct at p. 2645: "I indicated that if . . . the attorney and client have been able to mitigate the risk of non-payment . . . by agreeing to a contingent share of a substantial damage recovery . . . to that extent enhancement should be unavailable."

The fee agreement may affect the amount of the lodestar and the amount of the enhancement. The decisions of both lower Courts, that the fee agreement may properly be ignored in setting statutory fees, are in error. (In California all contingent fee agreements must be in writing. California Business and Professions Code 6147) The Court should grant the writ, vacate the fee award, and direct the trial court to require production of all fee agreements in this case.

6. Application of *City of Burlington v. Dague* ____ U.S.____, 112 S.Ct. 2638 (1992).

Respondents have not distinguished Judge Schwarzer's opinion in *Ackerman v. Western Electric Co.* 643 F. Supp. 836 (N.D. Ca. 1986), aff'd 860 F.2D 1514 (9th Cir. 1988). There, at 643 F.Supp at p. 868, the trial court followed *Blum v. Stenson* 465 U.S. 886 (1986) and not the precedent of the California Fair Employment and Housing Commission in the matter of enhancement, the Court declining any enhancement. The Ninth Circuit affirmed the District Court's decision in *Ackerman,* without deciding whether federal or state law governs the computation of attorney fees under Calif. Gov't Code 12965(b) for services rendered in a case in federal court. The Ninth Circuit concluded in footnote 5 that there was no significant difference in 1988 between state and federal law in the matter of calculation of attorney fees under a fee-shifting statute. 860 F.2d p. 1520.

Given *Dague,* there is now such a difference. Federal courts applying federal fee shifting statutes may not in general enhance the lodestar. California courts applying California statutes have discretion to make an enhancement. There is certainly not in California any ironclad right to enhancement, as Respondents seem to suggest.

Dague is a rule of procedure which ought to apply in federal court in all fee-settings, whether the right to fees arises from a federal statute, a state statute, a local ordinance, a contractual provision, or common law rules such as quantum meruit. A lawyer practicing in federal court is an officer of the federal court. The amount of his or her compensation ought to be governed by the federal law.

In ordering the $255,000 enhancement, Judge Legge expressly relied on *Fadle v. City & County of San Francisco* 859 F.2d 649 (9th Cir. 1988) and the concurring opinion in *Pennsylvania v. Delaware Valley Citizens Council ("Delaware Valley II")* 483 U.S. 711 (1987). See December 14, 1990 hearing transcript p. 23. The said transcript was delivered to this Court with undersigned's letter of September 30, 1992.

Because the Ninth Circuit did not address the implications of *Dague*, and because Judge Legge did not have the benefit of that decision when he set the fees in this case, the enhancement issue in this case should be remanded to Judge Legge for reconsideration in the light of *Dague* even if the Court determines that *Dague* does not preclude enhancement in federal court under state fee-shifting statutes. Judge Legge may exercise his discretion differently in the light of *Dague*.

7. Conclusion.

Let us assume that, under their contract with plaintiffs, counsel are entitled to one-third of the damage recovery of $311,949. Presently under submission to the Ninth Circuit is Respondents' motion for attorney fees on appeal, in the amount of $148,000. Should the Ninth Circuit and Judge Legge grant fees on appeal in that amount, the attorney fees and costs in this case will be as follows:

1.	Contingent fee	$104,000
2.	Lodestar (2000 hours times $170)	340,000
3.	Enhancement	255,000
4.	Fees for fee applications	16,200
5.	Costs	8,500
6.	Fees on appeal	148,000
7.	Interest on fees and costs of $619,700 from December 14, 1990—approximate	60,000
	Total fees and costs	$931,700

The four plaintiffs will have recovered $208,000, about $52,000 each. The class has recovered nothing. No injunctive or declaratory relief was granted in this case. As we have seen, the lost wages damage judgments of the plaintiffs are excessive.

A result such as this does not happen without legal error. The enhancement should be eliminated. The hours should be reduced by about half to account for loss of the class action. Lawyers of only 4 and 9 years' experience should receive an hourly rate closer to $100 than $170. When the lodestar has been properly set, it

should be reduced by the amount of the contingent fee. There should be no fees on appeal.

Petitioners respectfully pray that the writ of certiorari be granted, and that this Court grant Petitioners a new trial of the 1986 discrimination charges and all damage issues in the case. Petitioners are entitled to a new trial of the lost wages damages, and the emotional distress and punitive damage if any should be set at the same time as lost wages damages, *Kuffel v. Seaside Oil Co.* 11 Cal App. 3d 354, 367 (1970).

Petitioners should have a new trial of Braden's charges of 1987 retaliation, and of Braden's and Brook's charges of retaliation in 1988 and 1989. The trial court erroneously granted summary judgment and a directed verdict on these retaliation issues.

The fee award should be summarily reversed and remanded to the District Court with instructions to require production of all fee agreements pertaining to this case and all original time records of plaintiffs counsel, and to permit reasonable cross-examination of those documents. This Court should hold that *Dague* precludes enhancement of attorney fee awards in federal court.

Respectfully submitted

JOSEPH L. ALIOTO
650 California Street
Suite 2500
San Francisco, CA 94108
Tel.: (415) 434-2100
Attorney for U.A. Local 38 Convalescent Trust Fund

PETER P. MACHI
246 Van Ness Avenue
San Francisco, CA 94102
Tel.: (415) 621-1501
Attorney for Estate of Joseph P. Mazzola

LAWRENCE ALIOTO
465 California Street
Suite 736
San Francisco, CA 94104
Tel: (415) 399-0533
Counsel of Record and Attorney for All Petitioners